STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Independent Telephone Association	)	
	)	**Docket No. 01-0808**
Petition requesting an Emergency Order	)	
with regard to Intrastate Access Charges	)	
of Incumbent Local Exchange Carriers	)	
serving 35,000 or fewer Access Lines	)	

REPLY BRIEF OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

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I. Introduction

The Staff of the Illinois Commerce Commission (hereafter "Staff") hereby submits, pursuant to Section 200.800 of the Rules of Practice before the Illinois Commerce Commission, 83 Ill. Admin. Code 200.800, its Reply Brief in the above-captioned matter. In this Reply Brief, the Staff will respond to arguments made by the Illinois Independent Telephone Association (hereafter "IITA"); Illinois Bell Telephone Company (hereafter "SBC"); AT&T Communications of Illinois, Inc. (hereafter "AT&T"); Harrisonville Telephone Company (hereafter "Harrisonville"); and Leaf River Telephone Company (hereafter "Leaf River").

II. Commission Authority

As an initial matter, the Staff notes with interest IITA's and Leaf River's argument, *see* IITA IB at 25; Leaf River IB at 2 *et seq.*, that the Commission has no jurisdiction over any aspect of small carriers' intrastate rates. In support of this proposition, Leaf River refers the Commission to Section 13-504 of the Public Utilities Act. Id.

First, although not by any means foremost, such a legal position is completely at odds with both IITA's and Leaf River's conduct to date. In its Emergency Petition – which initiated this proceeding – the IITA requested that the Commission enter an order "direct[ing]" ILECs with 35,000 or fewer access lines to file intrastate access tariffs pursuant to the Emergency Order to be effective January 1, 2002, mirroring all *MAG Orders'* interstate access rate elements except the local switching rate. IITA Petition, ¶13 (emphasis added). In the alternative, IITA requested that the Commission enter an order "directing that intrastate access rates of all Incumbent Local Exchange Carriers serving 35,000 or fewer access lines be frozen at existing levels until further order of the Commission." IITA Petition, ¶14 (emphasis added).

Thus, IITA filed, in December 2001, an Emergency Petition *seeking the very relief it and Leaf River now assert that the Commission has no authority to grant*.

This is paradoxical. The Commission's authority is no less, and no greater, now than it was when IITA filed its Petition, since Section 13-504 has not been amended in the interim. Accordingly, the Commission can safely assume that IITA and Leaf River do not advance this argument with much conviction.

Further, had IITA and Leaf River in fact believed that the Commission lacks authority to regulate certain intrastate rates, small carriers could have saved all concerned a great deal of trouble by simply raising their intrastate access rates in December of 2001, since they now contend that they are – and were, at all relevant times – fully authorized to do so. They did not. This proceeding was initiated by the small carriers, and has served no one's convenience but theirs. All others concerned would have gladly foresworn it.

Moreover, and related, to the extent that this claim has any merit, IITA and Leaf River have taken every possible step to waive it. Neither IITA nor Leaf River raised any challenge to the Commission's jurisdiction over small carrier rates when the Commission entered its December 28, 2001 *Interim Order* in this proceeding, freezing small carrier rates at their current levels. *See* Interim Order at 6. In other words, IITA and the small carriers have, without objection or demur, conducted their activities for over a year under a Commission order freezing their access rates; indeed, they affirmatively sought such an order. Petition, ¶14. IITA and Leaf River did not, at any point during the intervening year, dispute the Commission's authority to set rates. Accordingly, it is fair to deem this point waived.

The Staff notes that the IITA Initial Brief appears to indicate that IITA brought its Emergency Petition for the purpose of streamlining and consolidating the proceedings that would have resulted if the small companies had filed tariffs increasing intrastate access rates without first seeking Commission approval. The IITA states that, in the event that the small companies did so,

> [T]elecommunications carriers subject to such an access charge change by a small company, have the right under Section 13-504 to file a Complaint or a request for an investigation with the Commission (**a right that there is little doubt they would exercise**); and the Commission is then required to investigate the proposed change.
>
> IITA IB at 26 (emphasis added)

Assuming this to be the case – and, based upon the positions expressed by AT&T, SBC and Verizon in this proceeding, it is difficult to argue that it is not – the Commission might be well advised to take IITA at its word, and treat this proceeding as such. If IITA seeks, for the benefit of its members, to resolve this matter in a universal proceeding that yields a uniform result, the Staff fully concurs. The present docket is precisely such a proceeding, and the Commission should make its ruling here, as opposed to in a large number of rate cases.

IITA's and Leaf River's arguments should therefore be disregarded.

III. Mirroring

Staff recommends the Commission mirror the MAG orders. Staff IB at 24. So does Verizon, IB at 3, AT&T, IB at 2, and SBC Illinois, IB at 5. The IITA favors mirroring with the exception of the local switching rate, which according to the IITA should be adjusted to (1) recoup revenues lost through mirroring the other MAG intrastate rates and (2) adjusted bi-annually thereafter to allow IITA member companies to earn their cost of capital. IITA IB at 28-32; *see also* Harrisonville IB at 1; Leaf River IB at 3.

The MAG orders basically shift the recovery of non-traffic sensitive costs from traffic sensitive interstate rates to the non-traffic sensitive subscriber line charge according to IITA witness Mr. Schoonmaker. Tr. at 168. The IITA proposal is inconsistent with this policy goal, since under the IITA recommendation non-traffic costs would be shifted from two traffic sensitive intrastate rates (tandem switching and tandem transport) to another non-traffic sensitive intrastate rate, local switching. Staff IB at 8.

Not only is the IITA proposal inconsistent with FCC policy, it is also at odds with rational economic pricing. Cost based pricing dictates that non-traffic sensitive costs be recovered from non-traffic sensitive rate elements. Staff IB at 14. The IITA proposal, because it calls for the recovery of non-traffic sensitive costs from traffic sensitive rate elements, represents bad economics and should be rejected accordingly.

Finally, the IITA proposal is inconsistent with existing Commission policy. The Commission's Forty-Sixth Interim Order in Docket No. 83-0142 removed non-traffic sensitive central office equipment costs from the local switching rate. The IITA proposal would move non-traffic sensitive costs currently recovered by the TIC and tandem switching back into the local switching rate. This action would re-establish implicit subsidies in the intrastate switching rate, which is contrary to the Commission's long standing efforts to remove implicit subsidies from rates. Staff IB at 9.

This proceeding should not examine general revenue requirement issues, since these questions are best addressed in a separate docket. Rather, this proceeding ought to focus on whether the Commission should mirror the MAG orders, and if so, how any revenue shortfall from mirroring, and only mirroring, be made up. Staff IB at 19. It is beyond the scope of this docket to address revenue shortfalls that small companies claim exist for reasons that have nothing to do with the MAG orders. Staff IB at 19.

Moreover, much if not all the revenue shortfall small companies currently experience is due to their failure to raise local rates for non-primary lines. Staff Ex. 1.0 at 8. If IITA member companies raised non-primary line rates to cost, as intended by the Commission then their revenue shortfall problems would ease considerably, if not completely. The IITA may be concerned that raising second line rates to cost will cause subscribers to drop second lines but have not filed any evidence that supports this contention. Staff Ex. 1.0 at 8. Consequently, the Commission should reject the second part of the IITA MAG mirroring proposal, which consists of adjusting the intrastate local switching rate in such a manner that will enable IITA member companies to earn their cost of capital.

Another reason why the Commission must reject the second part of IITA's mirroring proposal is because the IITA does not believe its member companies should be bound by its own recommendation. IITA IB at 24. The IITA suggests that its member companies could opt for company-specific proposals for the determination of intrastate access charge rates. IITA IB at 24. If the Commission adopts the IITA proposal, therefore, it is not approving a uniform policy on access pricing, but giving IITA member companies *carte blanche* for setting intrastate access rates. This will lead to a series of intrastate access rates, which are not based on any consistent rationale, but rather on the whims of company owners. Such inconsistency in intrastate access pricing will complicate rate making for intrastate long-distance carriers and could balkanize the intrastate long-distance market in Illinois.

IV. Revenue Neutrality

Staff recommends that the Commission adopt a policy of revenue neutrality in this proceeding. Staff IB at 20. That is, if the Commission opts for a policy of mirroring, it should also provide a means for companies affected by mirroring to recoup any revenues lost because of mirroring. In addition, mirroring and the policies enacted to recoup revenues lost through mirroring should occur at the same time.

All other parties agree with the exception of AT&T. AT&T contends that small companies should only be entitled to recoup revenues lost when non-traffic sensitive costs were shifted out of the Transitional Interconnection Charge (TIC) to the common line category at the federal level. AT&T IB at 2. AT&T argues that revenue neutrality has not been a requirement or result of mirroring in the past, and the Commission should no establish such a precedent in these proceedings. AT&T IB at 8. Moreover, AT&T contends that the revenue losses that result from mirroring will depend upon the vintage of interstate access rates chosen and therefore revenue impacts are uncertain. AT&T IB at 12-13.

AT&T's arguments regarding revenue neutrality must be disregarded. If explicit Commission action reduces the revenues of the small companies, then the Commission, on the grounds of fairness, has the obligation to provide a means for the small companies to recoup any revenue lost by these actions. Staff IB at 21.

In support of its arguments advocating a non-revenue neutral approach, AT&T relies upon the Commission's decision in Docket Nos. 97-0601/0602, which rejected the revenue neutrality for Verizon and SBC Illinois, when the Commission reduced access rates for these two companies. However, it should be noted that Verizon did not apply to recover revenues lost because of the Commission's decision in the *Access Charge Order*, implying that its rate of return was satisfactory even after the Commission imposed cost based intra-state access rates. Staff IB at 22. SBC Illinois was then and is now subject to alternative price-cap regulation, rendering rate of return issues purely academic.

In contrast, the small companies, because they have not raised non-primary line rates, are not likely earning the after tax cost of capital employed in the consolidated USF dockets. In addition, if the Commission denies revenue neutrality, it will cause the small companies to file for increased local rates in any event. The Commission cannot stop any small company from enacting retail rate increases unless 10% of that company's ratepayers object. 220 ILCS 5/13-504(a). If most or all of the small companies do this, the Commission will have to undertake a time-consuming rate case activity for 40-50 small companies – an undertaking likely to be burdensome for the small companies as well. Finally, although the revenue losses that companies experience because of mirroring will depend upon the vintage of rates chosen, once the Commission decides on the vintage of interstate rates it wants to mirror, the revenue impacts will be certain, and the Commission should compensate the small companies for these revenue losses. Staff Ex. 1.0 at 8.

V. Recouping Revenue Lost Through Mirroring

Staff recommends that any revenue shortfall small companies experience because of mirroring be made up through the imposition of a state subscriber line charge or in the alternative through local rate increases. Staff IB at 25. Verizon agrees. Verizon IB at 4. SBC Illinois proposes that both local rates and the affordable rate be increased up to a limit of $3 per month and that further revenue shortfalls be addressed by more Universal Service Funding. SBC IB at 5. AT&T contends that TIC mirroring shortfalls be handled through local rate increases, as long as this does not cause local rate to exceed the initial "affordable rate" established by the Commission. To the extent this is not possible, AT&T argues that small companies be allowed to petition for increased USF support. AT&T also supports some increase in the affordable rate. AT&T IB at 2-3. The IITA advocates that revenue shortfalls be addressed through increasing the intrastate local switching rate. IITA IB at 28-32. Harrisonville, Harrisonville IB at 1, and Leaf River, Leaf River IB at 3, support the IITA position. In the alternative the IITA propose that any revenue shortfalls caused by mirroring be met through increased USF funding.

The IITA argues against local rate increases because this may cause local rates charged by small companies to rise above the affordable level set by the Commission. IITA IB at 18-19. The IITA apparently contends that the $20.39 minimum affordable level set by the Commission is a policy target, and that the Commission should prevent local rates from rising above this policy level. Leaf River makes similar arguments. *See, generally*, Leaf River IB.

IITA's argument is flawed for three reasons. First, small companies have the authority to raise rates above the $20.39 level it they wish to do so. The Commission cannot legally prevent small companies from charging more than $20.39, as evidenced by the Adams telephone company, which raised rates above levels recommended by the USF transition plan. Staff Ex. 1.0 at 9. Second, the Commission only authorized $20.39 as the <u>minimum</u> affordable rate, and did so as a means of determining a correct size for the Universal Service Fund. Leaf River, Yates City, Metamora, Flat Rock and FC of Midland currently charge more than $20.39. Staff Ex. 1.0 at 9. This is because the USF order set affordable rates higher than $20.39 for these companies. *See, generally*, Second Interim Order on Rehearing. It makes no policy sense to prevent rates for some small companies from rising above $20.39, when the

Commission has already authorized rates higher than $20.39 for other small companies. Third, the Commission set the affordable rate solely for the purpose of sizing the Universal Service Fund. The Commission never stated that the affordable rate was the <u>maximum</u> rate that small company subscribers should be required to pay. Staff Ex. 1.0 at 8.

Since the affordable rate was set solely for the purposes of sizing the USF fund, and was not intended as a maximum rate that subscribers of small companies should pay, re-opening the USF docket for the purpose of resetting the affordable rate, as SBC Illinois and AT&T urge, is unnecessary. Small companies can legally charge more than the affordable rate currently and the Commission does not have to authorize a higher affordable rate for small company local rates to rise above the affordable level. If the affordable rate was reset, at a higher level, as proposed by SBC Illinois, *ceteris paribus*[1], the subsidies that small companies would receive would fall. The SBC Illinois proposal would only work if the Commission increased the affordable rate and made changes to its estimate of the proper amount of costs to be recovered by local rates as well.

Leaf River opposes Staff's subscriber line charge proposal because such a voluntary pool in Leaf River's estimation will not work. Leaf River IB at 8. Leaf River argues that a voluntary pool is twice taxable, and therefore undesirable. Leaf River IB at 8. This, however, mischaracterizes Staff's proposal.

The Staff is <u>not</u> proposing that subscriber line charge pooling be <u>voluntary</u>. Rather, the Staff recommends that the Commission <u>mandate</u> pooling of the subscriber line charge revenue. In this way, there would be no double taxation issue since the pool would be a public requirement. Staff did propose a voluntary pooling of revenues for small companies -- a

1 "All else equal", for the benefit of fans of Latin.

pooling of revenues unrelated to the subscriber line charge -- so that individual companies would not experience unacceptable revenue shortfalls because of unusual circumstances. If such voluntary pooling does cause double taxation, Staff recommends that the small companies come to agreement among themselves regarding the matter, and then ask the Commission to mandate this pooling arrangement. Staff would support any reasonable request the small companies made in this regard. Again, since the pool would then be a publicly ordered requirement, there would be no double taxation issues.

Staff opposes any increases in USF funding as proposed by SBC Illinois because increased subsidies are not in the public interest. Staff Ex. 2.0 at 3. The Commission has already determined how much Illinois subscribers should be taxed, in the form of Universal Service Fund contributions, in order to support the small companies, and further increases in this tax are unwarranted at this time. Staff Ex. 2.0 at 3. Furthermore, the cost in terms of Commission, Staff, intervenor and small company time and effort for the amounts of increased funding proposed by SBC Illinois outweighs any possible benefits that reopening the USF case would bring to the companies that would receive more USF funding under the SBC proposal. Staff Ex. 2.0 at 4.

Similarly, Staff opposes the alternative recommendation of the IITA, which is that the entire revenue shortfall purportedly attributable to mirroring be made up by increased USF funding. The IITA is basically proposing that Illinois subscribers, including low-income subscribers in Chicago and other urban areas, pay higher taxes on telephone service so rates for small company subscribers do not rise above current levels, and that the companies do not experience the discomfort of any amount of revenue shortfall. In the Staff's opinion, subscribers statewide should not be required to pay higher rates every time there is a policy change regarding recovery of telephone costs for small companies. Staff Ex. 1.0 at 16. Moreover, increasing USF funding is counterproductive since it will simply encourage small companies to solve all their real and perceived financial problems via regulatory pleading, rather than through cost reductions and revenue generation. Staff Ex. 2.0 at 3. Staff notes that the very existence of this proceeding supports this assertion.

Staff also opposes IITA's primary recommendation, which is that MAG revenue shortfalls be accommodated by higher local switching rates. Again, for reasons articulated in Section III above, this is inconsistent with FCC policy, ICC policy and rational economic pricing. In addition the IITA proposal would authorize revenue shortfalls not related to the MAG orders be accommodated by a higher local switching rate as well. Under the IITA proposal any revenue shortfalls that IITA member companies experience because of their failure to raise non-primary line rates to cost, as envisaged by the Commission in Docket No. 00-0233/0335, would be accommodated by increased local switching rates. Tr. at 178. Long distance carriers would, under the IITA proposal, implicitly subsidize discretionary second line rates for small company subscribers. Staff Ex. 1.0 at 9. In this way, the IITA would negate the Commission's specific order in Docket No. 00-0233/0335, which was that subscribers of non-primary lines should bear the cost of providing these lines.

Staff also is of the opinion that the revenue shortfall from mirroring be calculated on the basis of 2001 intrastate access minutes. Tr. at 238. IITA argue that 2002 minutes be used. IITA IB at 36. SBC Illinois supports this proposal. SBC IB at 6. Staff favors using 2001 minutes of use data because this data has already been formally introduced and vetted in this proceeding, and is therefore uncontroversial. If updated minute data is used, the IITA will have to collect this information, introduce the information into this docket, and Staff and the intervenors will have to review this information, which will cause delays in implementation. In the absence of formally introducing this information into the record of this docket, disputes could arise concerning the relevance to or the accuracy of this information in the Commission's order.

VI. Transition Period

Staff does not propose a transition period for local rate increases of less than two dollars and in any event recommends that the transition period last no longer than two years (i.e, local rate increases would be phased in, with the first increase to take place October 1, 2003 and the second and final increase to take place October 1, 2004). Staff IB at 28. SBC Illlinois suggests a three-year transition period with local rate increases of no more than one dollar per year. SBC IB at 5. Three years, however, is too long a transition period and one dollar a year is too modest a local rate increase proposal.

In addition, SBC Illinois recommends that full mirroring occur immediately, while rate increases necessary to achieve revenue neutrality be phased in over a period of time, with the difference made up by the USF fund. SBC IB at 5. Under SBC Illinois' proposal, Illinois subscribers would pick up the cost of transitioning through increased universal fund taxes, while inter exchange carriers would enjoy the full benefits of mirroring immediately. Since interexchange carriers are the primary beneficiaries of mirroring, it would be more logical for these companies to delay realization of some of the benefits they are going to enjoy from mirroring, in the interests of making local rate increases for small companies more palatable. Staff Ex. 2.0 at 9. Consequently, Staff recommends that if there is a transition period, in the first year only half mirroring would occur with the other half occurring in the second year. Local rates would increase in each year to a level that would make each affected company whole.

VII. Reopening the USF Docket

Staff recommends that the Commission re-open the USF docket for the limited purpose of determining whether wireless carriers should be required to contribute to the USF fund. Staff IB at 29. SBC Illinois concurs. SBC IB at 1.

Verizon on the other hand states that this is inconsistent with Section 13-301 of the Illinois Public Utilities Act. Verizon IB at 6. Verizon argues that, inasmuch as Section 13-301(d) states that the USF surcharge is to be recovered from "local exchange and interexchange carriers", and Section 13-301(e) exempts wireless carriers, the Commission cannot impose a USF surcharge on wireless carriers.

Verizon is simply incorrect. The USF fund was set up pursuant to Section 13-301(d), a subsection in which an exemption for wireless carriers is conspicuous by its absence. *See* 220 ILCS 5/13-301(d). However, in the interest of clarifying this important issue, a detailed survey of the relevant portions of the Public Utilities Act is warranted.

Section 13-301(d) of the Public Utilities Act provides, in relevant part, that "if a [state] universal service support fund is established, the Commission shall require that all costs of the fund be recovered from **all local exchange and interexchange telecommunications carriers certificated in Illinois on a competitively neutral and nondiscriminatory basis.**" 220 ILCS 5/13-301(d) (emphasis added).

Section 13-202 of the Act defines a "telecommunications carrier" as "every corporation, company, association, joint stock company or association, firm, partnership or individual, their lessees, trustees or receivers appointed by any court whatsoever that owns, controls, operates or manages, within this State, directly or indirectly, for public use, any plant, equipment or property used or to be used for or in connection with, or owns or controls any franchise, license, permit or right to engage in the provision of, telecommunications services between points within the State which are specified by the user." 220 ILCS 5/13-202. While it contains several exemptions, it does not include any provision that purports to exempt cellular or wireless carriers from the definition. Id.

Section 13-203 of the Act defines "telecommunications service" as:

> [T]he provision or offering for rent, sale or lease, or in exchange for other value received, of the transmittal of information, by means of electromagnetic, including light, transmission with or without benefit of any closed transmission medium, including all instrumentalities, facilities, apparatus, and services (including the collection, storage, forwarding, switching, and delivery of such information) used to provide such transmission and includes access and interconnection arrangements and services.

220 ILCS 5/13-203

It is indisputable that wireless carriers provide a telecommunications service within the meaning of Section 13-203.

While Section 13-203 contains a number of exemptions, it again does not include any provision that purports to exempt cellular or wireless service from the definition. Section 13-203 permits the Commission to, by rulemaking, exclude wireless telecommunications from "active regulatory oversight." 220 ILCS 5/13-203. The Commission has conducted such a rulemaking, and specifically exempted wireless carriers from the application of Sections 13-501, 13-502, 13-503, 13-504, 13-505 and 13-509 of the Act. *See* 83 Ill. Admin. Code 760.10. Each of the statutory sections referred to in 83 Ill. Admin. Code 760.10 deals with the obligation to file tariffs, classify services as competitive or noncompetitive, and file contracts to provide service where these vary from tariffed terms and conditions. *See, generally*, 220 ILCS 5/13-501, 13-

502, 13-503, 13-504, 13-505, 13-509.

Section 13-204 of the Act defines "Local Exchange Telecommunications Service" as "telecommunications service between points within an exchange, as defined in Section 13-206, or the provision of telecommunications service for the origination or termination of switched telecommunications services." 220 ILCS 5/13-204. It is difficult to dispute that wireless carriers provide such a service.

Section 13-205 defines "Interexchange Telecommunications Service" as "telecommunications service between points in two or more exchanges." 220 ILCS 5/13-205. Again, it is difficult to dispute that wireless carriers provide such a service.

Further, the only decisions of the Illinois Appellate Court on the subject support the contention that wireless carriers are fully subject to Illinois statutory obligations. In <u>Chicago SMSA L.P. v. Department of Revenue</u>, the Appellate Court was called upon to decide the issue of what the General Assembly meant by "exclude … from active regulatory oversight." <u>Chicago SMSA L.P. v. Department of Revenue</u>, 306 Ill.App.3d 977, 715 N.E.2d 719 (1st Dist. 1999). There, a number of cellular telephone service providers argued that, as a result of the Commission's determination that they ought to be excluded from active regulatory oversight within the meaning of Section 13-203, they were properly exempt from the invested capital tax, which, by its terms, did not apply to "persons who are not regulated by the Illinois Commerce Commission" within the meaning of Section 2a.1 of the Messages Tax Act. <u>Chicago SMSA</u>, 715 N.E.2d at 722-3; *see also* 35 ILCS 610/2a.1. The Commission, in exempting the appellants, had found that the "General Assembly did not direct that competition be allowed to substitute for regulation, only for certain aspects of regulation." <u>Chicago SMSA</u>, 715 N.E.2d at 723, *citing* <u>Chicago SMSA Limited Partnership: Petition for rulemaking with respect to</u>

exclusion of cellular radio service from active regulatory oversight, ICC Docket No. 85-0477, 1987 Ill. PUC LEXIS 10 at 50-51; 81 P.U.R.4th 287 (February 18, 1987)[2]. It further determined that the exemption only extended to the Article XIII requirement that appellants file tariffs with the Commission, and that "all other provisions of the [Public Utilities] Act remain applicable to providers of cellular radio service…[.]" Chicago SMSA, 715 N.E.2d at 723, *citing* 1987 Ill. PUC Lexis 10 at 59-60.

Based upon the Commission's ruling, the Court found that the Commission's exemption of appellants from active regulatory oversight did not constitute an exemption from all regulatory oversight, and that, accordingly, the Commission "regulated" appellants within the meaning of Section 2a.1 of the Messages Tax Act. Chicago SMSA, 715 N.E.2d at 723-4. The Court also found that federal law did not preempt state regulation of cellular companies, except to the extent that states purported to regulate rates or conditions of entry. Chicago SMSA, 715 N.E.2d at 726.

The Appellate Court was presented with a very similar question in Southwestern Bell Mobile Systems v. Department of Revenue, 314 Ill.App.3d 583, 732 N.E.2d 57 (1st Dist. 2000).

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2 There, the Commission found that:

> If Petitioner … [is] proposing that this Commission, by rule, declare cellular radio service is not a telecommunications service subject to the Commission's jurisdiction, the Commission rejects this proposal. Neither the language in Section 13-203 nor that in Section 13-103 support such an interpretation of the Law. Section 13-203 authorizes this Commission to remove cellular radio service "from active regulatory oversight." That language suggests this Commission should maintain some level of regulatory oversight over cellular radio service. Section 13-203 further provides that removal from oversight should be "to the extent it finds . . . such exclusion is consistent with the public interest and the purposes and policies of this Article." The Commission interprets this language as requiring an analysis of the provisions of the Act that apply to cellular radio service and deciding which provisions need not be complied with under the standard set forth in Section 13-203. Support for this interpretation is found in the language of Section 13-103(b), quoted above, which provides that "competition should be permitted to function as a substitute for certain aspects of regulation. . . ." **The General Assembly did not direct that competition be allowed to substitute for regulation, only for certain aspects of regulation**.
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> 1987 Ill. PUC Lexis 10 at 50-51 (emphasis added).

It likewise determined that the Commission's decision to exempt cellular carriers from active regulatory oversight was not tantamount to complete deregulation. Southwestern Bell Mobile Systems, 732 N.E.2d at 60-61. In so finding, the Court noted that the Commission was not authorized to exempt cellular carriers from the definition of "telecommunications carrier", or cellular service from the definition of "telecommunications service", but rather was authorized to exempt the carriers and service from active regulatory oversight. Id.

Thus, it is clear that Verizon's rather summary dismissal of the statutory obligations of wireless carriers bears no scrutiny.

Likewise, the federal Telecommunications Act supports the proposition that wireless carriers are subject to assessment of state universal service surcharges. 47 USC §332(c)(3)(A) provides, in relevant part, that:

> (1) Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, **except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.**
>
> **…**
>
> 47 USC §332(c)(3)(A)(emphasis added)

Congress appears to have considered the preemptive effect of Section 332 to be fairly narrow in its scope. The House Committee that considered this legislation determined that "terms and conditions" includes:

> Such matters as **customer billing information and practices and billing disputes and other consumer protections matters**; facilities siting issues (e. g., zoning); transfers of control; **the bundling of services and equipment**; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state's lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions."

H.R. Rep. No. 103-111, 103d Cong, 1st Sess. 211, 261, *reprinted in* 1993 U.S. Cong. &

Admin. News 378, 588 (emphasis added).

It has been found that Section 332 does not preempt state laws requiring telecommunications providers doing business in a state to contribute to state universal service funds. Cellular Communications Industry Assn. v FCC, 168 F.3d 1332 (DC Cir. 1999). There, the Court affirmed the FCC's conclusion that a state requirement that cellular carriers contribute to state universal service funds was "[an]other term or condition of service" rather that a rate or condition of entry, and hence a legitimate area of state regulation. Cellular Communications Industry Assn., 168 F.3d at 1335. Further, the Court found that, in light of the clear Congressional endorsement of state universal service funds found in Section 254(f) of the Telecommunications Act of 1996, 47 USC 254(f), the provisions of Section 332(c)(1)(A)(2) do not limit state authority to impose universal service requirements to those states where cellular is a substitute for land line communications. Cellular Communications Industry Assn., 168 F.3d at 1336. Likewise, the Court found that state action that increases the cost of doing business does not amount to state regulation. Id. Like results were reached in Mountain Solutions v. Kansas Corp. Comm'n, 966 F. Supp. 1043 (D.Kan. 1997), in Sprint Spectrum v. Kansas Corp. Comm'n, 149 F.3d 1058, 1061 (10th Cir. 1998), and in Bell Atlantic Mobile, Inc. v. Connecticut PUC, 253 Conn. 453; 754 A.2d 128 (2000).

Finally, sound policy – as set forth in the language of Section 13-301(d) – dictates that wireless carriers be required to assess the USF surcharge. Section 13-301(d), as noted above, provides that "all costs of the [USF] fund [shall] be recovered from **all local exchange and interexchange telecommunications carriers certificated in Illinois on a competitively neutral and nondiscriminatory basis.**" 220 ILCS 5/13-301(d) (emphasis added). Competitive neutrality and non-discrimination obviously require that wireline carriers not be placed at a competitive disadvantage *vis-a-vis* wireless carriers. Requiring that wireline carriers assess a USF surcharge, while permitting wireless carriers to avoid doing so, is clearly discriminatory and not competitively neutral, especially where – as here – wireless carriers are not exempt in the first place.

Accordingly, the Commission should re-open the USF docket at such time as is convenient for the limited purpose of determining whether wireless carriers should be required to contribute to the USF fund.

VIII. Conclusion

The Commission should reject the IITA's and Leaf River's arguments regarding Commission authority. It is impossible to reconcile IITA's position with its filing of a Petition seeking the relief it seeks in this proceeding and its subsequent conduct constitutes a waiver of any such argument. Likewise, resolving matters in this proceeding is, as the IITA appears to concede, more efficient, and more likely to yield a uniform result, than multiple small-company rate proceedings.

The Commission should continue its policy of mirroring, and direct the small companies to fully mirror interstate rates as prescribed in the *MAG Orders*. The Commission should not allow the small carriers to increase intrastate switching rates as a vehicle for recovering all purported revenue shortfalls.

The Commission should adopt a revenue-neutral solution, and more specifically should adopt the Staff's proposal of adopting a state subscriber line charge to make the IITA carriers whole. The Staff's proposal is fully consistent with FCC and Commission policies, is economically rational, and will be simple to implement. There should be no transition period, but if the Commission elects to adopt one, it should not exceed three years.

Finally, the Commission should reopen the USF proceeding for the limited purposed of determining whether wireless carriers should be required to assess the USF surcharge.

WHEREFORE, the Staff of the Illinois Commerce Commission respectfully requests that its recommendations be adopted in their entirety consistent with the arguments set forth herein.

Respectfully submitted,

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